

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

JOE PICENO,

Petitioner,

vs.

ROBERT LEGRAND, *et al.*,

Respondents.

Case No. 3:14-cv-00545-RCJ-WGC

ORDER

This petition for a writ of habeas corpus is before the court on respondents' motion to dismiss the petition as second and successive (ECF #10). Petitioner subsequently filed a motion for appointment of counsel (ECF #13), but has not responded in any other manner to respondents' motion to dismiss. Respondents opposed the motion for appointment of counsel (ECF #14), and petitioner replied (ECF #15). As discussed below, this petition must be dismissed as second and successive.

On the face of the petition petitioner indicates that he challenges his judgment of conviction in case no. C134909 (ECF #1-1, p. 2). Respondents point out in their motion to dismiss—and this court's docket reflects—that petitioner previously challenged this judgment of conviction in federal court in case no. 3:11-cv-00588-RCJ-WGC.

28 U.S.C. § 2244(3)(A) provides: “[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.” Where a petition has been dismissed

1 with prejudice as untimely or because of procedural default, the dismissal constitutes a disposition on
2 the merits and renders a subsequent petition second or successive for purposes of 28 U.S.C. § 2244.
3 *McNabb v. Yates*, 576 F.3d 1028, 1029-1030 (9th Cir. 2009); *Henderson v. Lampert*, 396 F.3d 1049,
4 1053 (9th Cir. 2005).

5 On March 12, 2013, the habeas petition in case no. 3:11-cv-00588-RCJ-WGC (challenging the
6 same judgment of conviction) was dismissed with prejudice as untimely (3:11-cv-00588-RCJ-WGC,
7 ECF #9). Judgment was entered on March 13, 2013. *Id.* at ECF #10. The Ninth Circuit Court of
8 Appeals denied a certificate of appealability. *See id.*, ECF #13.

9 The instant petition is, therefore, a successive petition, which requires petitioner to seek and
10 obtain leave of the Ninth Circuit Court of Appeals to pursue. *See* 28 U.S.C. § 2244(b)(3) et seq. On
11 the face of the instant petition, where the form asks whether petitioner has obtained leave to file a
12 successive petition from the Court of Appeals, petitioner wrote “N/A” (ECF #6, p. 2). Petitioner has
13 not indicated that he has obtained leave to file this successive petition; moreover, he has not responded
14 to respondents’ motion to dismiss the petition as successive. Accordingly, respondents’ motion to
15 dismiss is granted, and the petition shall be dismissed with prejudice as a successive petition.

16 **IT IS THEREFORE ORDERED** that respondents’ motion to dismiss the petition with
17 prejudice as a successive petition (ECF #10) is **GRANTED**.

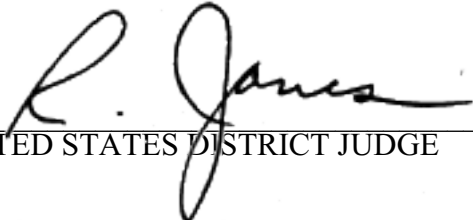
18 **IT IS FURTHER ORDERED** that respondents’ motion for extension of time to respond to
19 petition (ECF #9) is **GRANTED** *nunc pro tunc*.

20 **IT IS FURTHER ORDERED** that petitioner’s motion for appointment of counsel (ECF #13)
21 is **DENIED** as moot.

22 **IT IS FURTHER ORDERED** that a certificate of appealability is **DENIED**.

23 **IT IS FURTHER ORDERED** that the Clerk shall **ENTER JUDGMENT** accordingly and
24 close this case.

25 Dated this 25th day of June, 2015.

26 
27 UNITED STATES DISTRICT JUDGE
28